Supreme Court, U.S.
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No. 85-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILDRED STETZ, Personal Representative of the Estate of CHARLES K. ATTWOOD, Deceased,

Petitioner,

—against—

JOHN A. GRANT, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DAVID R. THOMPSON
ROY B. COWDREY, JR.
FRANCH, EARNEST & COWDREY, P.A.
130 N. Washington Street
Post Office Box 1747
Easton, Maryland 21601
(301) 822-6800

Counsel for Respondent

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QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURTS, REVIEWING THE ENTIRE RECORD, CORRECTLY CONCLUDED THAT THE EVIDENCE ADDUCED AT TRIAL RAISED ISSUES OF MEDICAL JUDGMENT BUT DID NOT FAIRLY ESTABLISH DELIBERATE INDIFFERENCE TO AN APPARENT MEDICAL NEED

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v.

JOHN A. GRANT, M.D.,

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BRIEF IN OPPOSITION TO PETITION
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STATEMENT OF THE CASE

Mildred Stetz, the mother of Charles K. Attwood and the personal representative of his estate, initiated this action

in the United States District Court for the District of Maryland. The complaint alleged that John Grant, M.D., committed medical malpractice in his diagnosis and treatment of Mr. Attwood's physical symptoms. Mrs. Stetz also asserted a claim under 42 USC §1983, asserting that Dr. Grant was deliberately indifferent to her son's serious medical condition. At the time Dr. Grant examined and treated Mr. Attwood, the patient was an inmate in the jail in Kent County, Maryland. Dr. Grant was the state and local public health officer. His responsibilities to jail inmates were not created by state or local law. Dr. Grant served as "jail physician" pursuant to a written contract with the Kent County legislative body.

Because Mrs. Stetz had failed to file her medical negligence claims in Maryland's Health Claims Arbitration Office prior to the institution of suit,

the district court dismissed the malpractice counts. The case was tried on the §1983 claim that Dr. Grant was deliberately indifferent to a serious medical condition, thereby inflicting cruel and unusual punishment on the plaintiff's decedent. The jury returned a verdict of $1.00 in nominal damages and $30,000.00 in punitive damages. Dr. Grant's motion for judgment notwithstanding the verdict was granted by United States Magistrate Daniel E. Klein, who presided over the jury trial by agreement of the parties. The plaintiff appealed Magistrate Klein's decision to the district court. Senior Judge Edward S. Northrop reviewed the record and heard the appeal pursuant to Fed. R. Civ. Pro. 73(d). He affirmed the decision of Magistrate Klein. Thereafter, pursuant to 28 USC §636(5), Mrs. Stetz petitioned the United States Court of Appeals for the Fourth Circuit for

leave to appeal the decision of the district court. The Fourth Circuit granted the petition, and the case was fully briefed and argued. After carefully considering the arguments of counsel and the entire record, the Fourth Circuit affirmed the entry of judgment for Dr. Grant. During the pendency of the appeal before the Fourth Circuit, Mrs. Stetz filed her medical malpractice claims in Maryland's Health Claims Arbitration Office.

The evidence in the district court established that Mr. Attwood's first documented episodes of illness began in the spring of 1978. At that time, he was seen by at least two neurologists, a psychiatrist, and various clinicians. He complained of dizziness, headaches, black outs, disorientation, outbursts of violence, blurred vision, and memory loss. He was seen on numerous occasions, and

ultimately diagnosed as a chronic alcoholic. He was referred to a residential alcoholic treatment program, but never enrolled. His problems persisted, and he was unable to hold a job. In 1981, he left his common law wife and three children to facilitate their receiving benefits from Maryland's Department of Social Services. At that time, Mr. Attwood moved in with his mother, Mrs. Stetz.

His headaches continued, together with occasional episodes of behavior which his mother felt to be unusual, and Mrs. Stetz urged her son to seek medical attention. Other than seeing a local physician for a prescription for antabuse, a drug to help control alcoholism, Mr. Attwood declined to seek medical attention. In July of 1981, while in his mother's presence, Mr. Attwood had an episode of very unusual behavior in which he seemed to lose all awareness of his

surroundings. His mother got him into the car and began the trip to the local hospital, some twenty miles away. While en route, Mr. Attwood regained his awareness, and informed his mother he did not wish to go to the hospital's emergency room. She acceded to his wishes, and returned home.

Later the same evening, Mr. Attwood had a similar episode, and this time, Mrs. Stetz successfully got him to the emergency room at the hospital in Easton, Maryland. He was seen first by an emergency room physician, then by an internist, Dr. Wood. Dr. Wood found Mr. Attwood to be confused and disoriented, and admitted him to the hospital for diagnostic testing. Mr. Attwood was referred to the staff neurosurgeon, Dr. Edgar Bering, who followed him in the hospital from July 26, 1981, through July 29, 1981. During the course of Mr.

Attwood's hospitalization, a battery of diagnostic tests were performed, including a brain scan, an EEG, and a lumbar puncture. In addition, a CAT scan was scheduled for July 30, 1981. CAT scan equipment was not then available in Easton, and the appointment was made at another hospital, approximately 60 miles away. During the course of his hospitalization, Mr. Attwood's physical condition steadily and dramatically improved. The neurosurgeon was sufficiently satisfied with Mr. Attwood's recovery that on July 29, 1981, the neurosurgeon authorized Mr. Attwood's discharge from the hospital. Mr. Attwood was discharged without diagnosis, and the CAT scan scheduled for July 30, 1981, was cancelled. No CAT scan was ever rescheduled by Dr. Bering or any other physician. The Easton Memorial Hospital records state that Mr. Attwood became "entirely

well." His treating neurosurgeon did not discuss Mr. Attwood's medical problems with him, nor with his mother. A routine follow up appointment was scheduled for August 19, 1981, three weeks later. The final diagnosis entered on the hospital's discharge summary was "stupor and headache, cause not determined."

Mr. Attwood failed to keep his July 19, 1981 follow-up appointment with Dr. Bering, the neurosurgeon. Dr. Bering never followed up in any way either before or after his patient failed to appear for the appointment. During the period following his discharge from the hospital, Mr. Attwood's mother urged him to go back to see the doctor or to return to the hospital, but he refused. On August 24, 1981, Mrs. Stetz took matters into her own hands and made an appointment for her son to see Dr. Bering on August 28, 1981.

On the same day that she made that appointment, her son was arrested pursuant to an outstanding bench warrant for contempt of court, issued as the result of Mr. Attwood's failure to make child support payments. Mr. Attwood was sentenced to the Kent County jail for a period not to exceed ninety days, or until he paid $756.00, his child support arrearage.

Upon his admission to the jail, Mr. Attwood was questioned concerning his physical condition as part of the medical screening process. Mr. Attwood told the admitting officer that he had been recently hospitalized for headaches, but that he was no longer having any problem. Nothing unusual about his behavior or physical condition was observed.

Mrs. Stetz visited the jail the day after her son's arrest and told the officer on duty about Mr. Attwood's

hospitalization and the appointment she had scheduled for August 28 with Dr. Bering. The officer referred her to Dr. Grant. The next day, August 26, she went to Dr. Grant's office and, in his absence, described her concerns to the nurse, asking that Mr. Attwood be sent to Dr. Bering's office to keep the appointment she had arranged. The nurse passed on her notes concerning this conversation to Dr. Grant when he returned to the office the next day. Dr. Grant immediately made arrangements to have Mr. Attwood brought to his office for examination. That same afternoon, August 27, Mr. Attwood was escorted to Dr. Grant's office from the jail by a sheriff's deputy. At that time Dr. Grant gave Mr. Attwood a physical examination and took his medical history. Dr. Bering, plaintiff's expert witness and the neurosurgeon who examined Mr. Attwood

at Easton Memorial Hospital, admitted in his testimony that Dr. Grant's examination and medical history were very thorough. Based upon that physical examination and the history given to him by Mr. Attwood, which included Mr. Attwood's description of long term alcoholism and the extensive neurological testing recently performed at Easton Memorial Hospital, followed by his subsequent discharge without diagnosis, Dr. Grant concluded that Mr. Attwood's neurological symptoms were caused by alcoholism. The headaches, Dr. Grant concluded, resulted from sinusitis and the hearing problem was due to impacted ear wax. Mr. Attwood, of course, did not tell Dr. Grant about the possibility that he was suffering from a brain tumor, nor did the message from Mrs. Stetz mention that possibility, since that information had not been given to them. Instead, Mr.

Attwood described the extensive testing done at Easton Memorial Hospital and advised Dr. Grant that the hospital had found nothing wrong with him. He also told Dr. Grant during the examination that he felt his mother was overly concerned.

Dr. Bering, employed as the plaintiff's expert at trial, stated in his testimony that Mr. Attwood's medical need at the time of Dr. Grant's examination was latent and not obvious. Indeed, the circumstantial evidence establishes that Mr. Attwood's medical need was not even apparent after four days of hospitalization and testing at Easton Memorial Hospital. It is undisputed that Mr. Attwood was discharged on Dr. Bering's orders, and that future diagnostic procedures were cancelled, and that only a routine follow-up appointment was scheduled. Even though Dr. Bering became

aware that his patient's CAT scan had been cancelled, he did not reschedule that procedure. Dr. Bering testified that Dr. Grant exercised his medical judgment, treated the conditions he found, and that the real issue in the case was a question of the medical judgment exercised by Dr. Grant. Dr. Stuart Grossman, plaintiff's other expert witness, declined on direct examination to testify that Dr. Grant was indifferent to Mr. Attwood's serious medical need or condition. Dr. Grossman's criticism of Dr. Grant's treatment was not that Dr. Grant was indifferent to the patient, but rather, that "he did not go the extra step" in his treatment and diagnosis.

Following his examination of Mr. Attwood, because of Mrs. Stetz's concerns, Dr. Grant communicated his diagnosis to her in a telephone call. Dr. Grant prescribed actifed for the

sinusitis which he had diagnosed and advised his patient that tylenol or aspirin were available at the jail upon request. He also explained to both Mr. Attwood and his mother that he would keep an eye on Mr. Attwood while he was incarcerated to see if his headaches improved under the actifed regimen. Mrs. Stetz agreed that Dr. Grant told her that in his opinion, the appointment with Dr. Bering was not necessary, that he believed the sinusitis treatment would help the headaches, and that Mr. Attwood would be monitored closely for any changes in condition.

Dr. Grant's next contact with Mr. Attwood occurred on September 1, 1981. During a sick call at the jail, he inquired specifically whether Mr. Attwood wanted to see him. Mr. Attwood declined to be seen by the doctor, and stated that his headaches had improved, suggesting

that the actifed was working. In fact, the jail records indicate that Mr. Attwood requested aspirin only twice during his confinement at the jail, once on August 26 prior to Dr. Grant's prescription, and thereafter on September 4, the evening he collapsed. There is no indication in the record that while at the jail, Mr. Attwood displayed any of the severe symptoms which he exhibited prior to and during his stay at Easton Memorial Hospital. Indeed, the testimony was to the contrary. In addition, there is no indication that Mr. Attwood ever requested medical treatment or medication other than the aspirin dispensed to him on two occasions, nor did he ever ask to be taken to the August 28th appointment with Dr. Bering. On August 26, 1981, the deputy dispensing the aspirin to Mr. Attwood inquired as to his physical condition and Mr. Attwood replied that

there was nothing wrong, he just had a headache. The deputy who gave tylenol to Mr. Attwood on September 4, 1981, during a conversation of some 5 to 8 minutes, noticed nothing unusual about his physical condition. Upon being asked by the deputy if he needed to see the doctor or nurse, Mr. Attwood's response was negative and he said it was just a headache.

That same evening, just before midnight, Mr. Attwood suddenly collapsed in his cell. He was taken to the Kent-Queen Anne Hospital, where he was seen by Dr. Grant. At that time, based upon the collapse related symptoms then apparent, Dr. Grant suspected a brain lesion. Mr. Attwood was flown to the University of Maryland Shock Trauma Unit in Baltimore, where he died on September 5, 1981. An autopsy revealed that Mr. Attwood had been suffering from a brain tumor.

Summary of Argument

The writ should be denied because the trial court and appellate courts correctly applied the standard set forth in Estelle v. Gamble, 429 U.S. 97 (1976). Reviewing the entire record, the lower courts properly determined that the petitioner's case raised issues of medical judgment and did not create a jury question under the Eighth Amendment. The decisions of the district court and the Fourth Circuit are consistent with settled law, and neither require the exercise of this Court's power of supervision, nor do those decisions conflict with applicable decisions of this Court.

While the courts below found it unnecessary to address whether Dr. Grant acted under color of state law, the evidence in this case establishes that Dr. Grant, who had no state created custodial responsibilities with respect to the

plaintiff's decedent, exercised his professional judgment as a physician, and did not act under color of state law so as to create a jury question under 42 U.S.C. §1983.

ARGUMENT

I. The Eighth Amendment Issue

The courts below recognized that the legal standard applicable to the Eighth Amendment aspect of plaintiff's claims was established by this Court in Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976). There, the Court concluded that "deliberate indifference to serious medical needs of prisoners" may give rise to a cause of action under 42 U.S.C. 1983. 429 U.S. at 104. However, the Court was careful to qualify its conclusion by pointing out that:

> In the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of

> pain' or to be 'repugnant to the conscience of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

429 U.S. at 106. The Court carefully distinguished between "deliberate indifference" and the exercise of a physician's medical judgment. Matters of medical judgment and differences of opinion with respect to medical treatment and diagnosis do not rise to the level of a constitutional violation. Indeed, the Court specifically declared that:

> the question whether an X-ray -- or additional diagnostic techniques or forms of treatment -- is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice and as such

> the proper forum is the state court... .

429 U.S. at, 107.

Clearly, the standard established by the Court in Estelle requires evidence of conduct which can fairly be characterized as the "unnecessary and wanton infliction of pain" or which is so outrageous that it is "repugnant to the conscience of mankind." Dr. Grant argued below, and the lower courts agreed, that in order to create a jury question concerning "deliberate indifference to a serious medical need," there must be evidence that a serious need for medical treatment was apparent and ignored.

Both the district court and the Fourth Circuit reviewed the record in this case in the context of Estelle and its Fourth Circuit progeny. Those cases included a Fourth Circuit decision factually analogous to the case now before

this Court. In Wester v. Jones, 554 F.2d 1285 (4th Cir. 1977), a prison inmate received a physical examination, including an eye examination and vision test, upon his commitment. He told the prison physician then that he had suffered an injury to his eye. Thereafter, and over the next year, Wester complained repeatedly of pain and loss of vision. Despite his medical history and his frequent requests, he received no additional treatment or diagnostic attention. In his §1983 suit, Wester alleged that the physician had made only a cursory initial examination and that he failed to re-examine him even after specific complaints. Subsequent to the filing of suit, the doctor defendant arranged to have Wester examined by a specialist. It was then determined that Wester had a serious problem with his eye that had existed at the time of the initial

examination, and that his vision had significantly deteriorated during his incarceration. The underlying serious medical condition was not immediately apparent and had not been perceived by the doctor during his initial examination. In affirming the district court's entry of summary judgment for the doctor, the Fourth Circuit applied Estelle and found that no constitutional claim had been stated. The Court noted that:

> It is undisputed that the doctor examined Wester and found no medical problem. Wester's continued complaints about the same symptoms did not persuade him to change this diagnosis on subsequent occasions.
>
> Even if the doctor were negligent in examining Wester and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs.

Wester v. Jones, supra, at 1286. See also, Zaczek v. Hutto, 642 F.2d 74 (4th

Cir. 1981). Indeed, as the Fourth Circuit noted in Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975), "mistreatment or non-treatment must be capable of characterization as 'cruel and unusual punishment' in order to present a colorable claim under §1983." See also Brown v. Commissioner of Cecil County Jail, 501 F. Supp. 1124, 1126, (D. Md. 1980).

In its analysis of cases arising under Estelle, the Fourth Circuit has required, either expressly or implicitly, that the alleged serious medical condition giving rise to the claim be apparent or obvious. In Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984), for instance, the court commented that while Estelle does not require a punitive motive, it is necessary that "the need for such treatment is apparent" before liability may be imposed. Id. at 164. Similarly, in Loe

v. Armistead, 582 F.2d 1291, (4th Cir. 1978), the Court noted that within several hours after the plaintiff fell on a jail basketball court, "it was obvious that the arm was broken since it was swollen around the upper forearm and elbow and it was locked in an extraordinary position." Id. at 1292 (emphasis supplied). Petitioner has not suggested that the Fourth Circuit's analysis of these issues is in conflict with the decisions of any other circuit. Respondent submits that the instant case was correctly decided below in accordance with the guidance of this Court as explained in Estelle. Mr. Attwood's brain tumor and his need for sophisticated diagnostic techniques were not apparent to the hospital based physicians who treated him in Easton and discharged him without a final diagnosis. Similarly, those needs were not apparent to the

neurosurgeon who scheduled a routine follow-up appointment for three weeks later, and who never mentioned a suspicion of a brain tumor to the patient or his family. Dr. Grant exercised the same medical judgment that his colleagues exercised. The exercise of incomplete or incorrect judgment does not rise to the level of an Eighth Amendment violation. Accordingly, there is no basis to grant the writ requested by petitioner.

A review of a sample of cases from other circuits suggests that the principles established in Estelle are well understood and consistently and appropriately applied. See., e.g. Benson v. Cady, 761 F.2d 335 (7th Cir. 1985); Johnson v. Treen, 759 F.2d 1236 (5th Cir. 1985); Bass v. Sullivan, 550 F.2d 229 (5th Cir. 1977).

II. Dr. Grant did not act under color of state law

Neither the trial magistrate who granted Dr. Grant's motion for judgment N.O.V. nor the reviewing courts addressed Dr. Grant's argument that under the facts of this case, Dr. Grant did not act under color of state law. Analysis of that issue provides another basis to deny the petition herein.

Dr. Grant's jail related responsibilities were not created by state or local law; rather, they were created by his contract with the local legislative body. While Dr. Grant was employed as a state and local public health official, that position did not require him to treat jail inmates. In examining Mr. Attwood and evaluating whether there was a medical need which required immediate referral to another physician, Dr. Grant

exercised the traditional function of a treating physician. His treatment and diagnosis of Mr. Attwood's physical symptoms were not the result of state created custodial obligations. Under the principles enunciated by this Court in Polk County v. Dodson, 454 U.S. 312 (1981), Dr. Grant did not act under color of state law, and for this reason, a writ should not be granted.

III. The Courts Below, After Reviewing The Entire Record Correctly Affirmed The Entry Of Judgment For Dr. Grant

After reviewing the entire record in this case, the trial magistrate, the reviewing district judge, and the Fourth Circuit correctly determined that the plaintiff's evidence raised only questions of medical judgment, and that the case never should have gone to jury. Not only was there insufficient evidence

to establish that Mr. Attwood's medical needs were apparent and serious, the evidence overwhelmingly established that Dr. Grant was attentive to his patient, examined and treated him promptly, and followed up with the patient several days later. Under the circumstances presented by this case, "reasonable and fair-minded persons in the exercise of impartial judgment and based upon the evidence presented, could not have properly returned a verdict in favor of the plaintiff in this action." Plaintiff argues that there were "permissible inferences" of deliberate indifference which the jury was entitled to draw. However, as the Fourth Circuit repeated in Wratchford v. S.J. Groves & Sons, Co., 405 F.2d 1061, 1066 (4th Cir. 1969):

> "Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the

> Court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture."

Id.; citation omitted. As the district court noted, plaintiff's claims in this case more properly lie in the state court system where they are presently pending, to be resolved under the traditional principles applicable to claims of medical negligence and medical standards of care. In this regard, it is noteworthy that the evidence presented by the plaintiff did not illustrate any outrageous conduct "repugnant to the conscience of mankind," nor was there any evidence that Mr. Attwood was subjected to "the unnecessary and wanton infliction of pain" contemplated by Estelle. Rather, the plaintiff presented expert medical opinion testimony which criticized the medical judgment exercised by Dr. Grant, but

as noted by the lower courts, the medical experts expressly declined to testify that Dr. Grant was indifferent to his patient. In essence, they testified that there were "clues" from which a more complete diagnosis could have been pursued. These circumstances however, do not create a constitutional violation.

CONCLUSION

For all of the reasons set forth above, it is respectfully requested that the petition for a writ of certiorari be denied.

DAVID R. THOMPSON
ROY B. COWDREY
FRANCH, EARNEST & COWDREY, P.A.
130 North Washington Street
P.O. Box 1747
Easton, Maryland, 21601
(301) 822-6800

Attorneys for Respondent